87-6571

(2)

NO. 87-6571

[redacted]

****

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

****

DETHORNE GRAHAM,

Petitioner

vs

M. S. CONNOR, R. B. TOWNES,
T. RICE, HILDA T. MATOS and
M. M. CHANDLER, *

Respondents

****

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

****

H. GERALD BEAVER
Beaver, Thompson, Holt
& Richardson, P.A
Attorneys at Law
806 Hay Street
P. O. Box 53247
Fayetteville, NC 28305
(919) 323-4600

Counsel of Record

* The Defendants below included all Defendants named as Respondents herein, plus the City of Charlotte, North Carolina

QUESTION PRESENTED

DO TERRY V. OHIO, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), TENNESSEE V. GARNER, 471 U.S. 1, 85 L. Ed 2d 1, 105 S. Ct. 1694 (1985) and WHITLEY V. ALBERS, 475 U.S. 312, 89 L. Ed. 2d 251, 106 S. Ct. 1078 (1986), REQUIRE A PLAINTIFF, WHO ASSERTS A CLAIM UNDER 42 U.S.C. § 1983 FOR FOURTH AMENDMENT VIOLATION INVOLVING UNREASONABLE SEARCH AND SEIZURE OF THE PERSON ARISING FROM THE ALLEGED USE OF EXCESSIVE FORCE BY POLICE OFFICIALS, TO ESTABLISH THAT THE POLICE ACTED "MALICIOUSLY AND SADISTICALLY FOR THE VERY PURPOSE OF CAUSING HARM"?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes

NO. _____

****

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

****

DETHORNE GRAHAM,

Petitioner

vs

M. S. CONNOR, R. B. TOWNES,
T. RICE, HILDA T. MATOS and
M. M. CHANDLER, *

Respondents

****

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

****

The Petitioner, Dethorne Graham, respectfully prays that the Supreme Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled proceeding on August 25, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 827 F.2d 945, and is reprinted in the Appendix hereto at pp. 1a-8a. (Citations to the Appendix will be hereafter referred to as "App. at p.)

The September 19, 1986 judgment of the United States District Court is reported at 644 F. Supp. 246 (W.D.N.C. 1986), and is set forth at App. at pp. 9a-15a.

The decision of the Fourth Circuit denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc is set forth at App. at pp. 16a-17a.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit was issued on August 25, 1987. Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on November 13, 1987. By order dated January 29, 1988, Chief Justice William H. Rehnquist extended Petitioner's time for filing this Petition for Writ of Certiorari to include March 12, 1988. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Fourth Circuit is invoked under 28 U.S.C. § 1541(1).

CONSTITUTIONAL PROVISIONS
AND STATUTES INVOLVED

This case involves 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343, as well as the Fourth and Fourteenth Amendments to the United States Constitutions. These provisions are set out in the Appendix hereto, at App. at pp. 18a-19a.

STATEMENT OF THE CASE

A. INTRODUCTION

Plaintiff filed this action on July 11, 1985, against the City of Charlotte, North Carolina, and five individual police officers, seeking damages for excessive use of force for violation of the Fourth Amendments' prohibition against unreasonable search and seizure, as made applicable to the States through the Fourteenth Amendment, and related claims. Plaintiff's claims against the individual officers are based on 42 U.S.C. § 1983 for the violation of his constitutional rights through the officers' excessive use of force; and under the common law of North Carolina for assault, false imprisonment, and infliction of emotional distress. His claims against the City of Charlotte were dismissed and are not at issue in this Petition.

The case was tried before a jury on September 16 and 17, 1986. At the conclusion of Plaintiff's evidence, all Defendants moved for a directed verdict. Defendants' motions were granted as to all counts alleged in Plaintiff's complaint. Plaintiff gave timely notice of appeal from the District Court's decision to the United States Court of Appeals for the Fourth Circuit.

B. FACTS

The Plaintiff, Dethorne Graham, is a diabetic. On November 12, 1984, Plaintiff was working on an automobile at his home in Charlotte, North Carolina, when he felt the onset

of a diabetic insulin reaction. An insulin reaction is a condition that occurs in diabetics when their blood sugar level drops. The symptoms include nausea, dizziness, and disorientation. Diabetics can usually sense an insulin reaction and treat it themselves without medical assistance by simply eating something containing sugar. If left untreated, however, the condition can progress to neurological disfunction, coma, or even death.

When the Plaintiff noticed his insulin reaction, he had a friend, William Berry, drive him to a nearby store to purchase some orange juice, knowing that the sugar in the orange juice would counteract the reaction. Plaintiff hurried into the store to purchase the juice, but soon realized that the line at the checkout counter was too long for him to wait. He therefore hurried from the store and into the car where Mr. Berry was waiting. Plaintiff then asked Berry to take him to his girlfriend's house, knowing that she would be able to help him.

Officer M. S. Connor, a Charlotte, North Carolina police officer, had been sitting in a patrol car near the store and noticed the hasty manner in which the Plaintiff entered and left the store. Officer Connor followed the car and made an investigative stop approximately one-half mile from the store. Mr. Berry informed Officer Connor that he thought Plaintiff was suffering a "sugar reaction". Connor refused to allow

the Plaintiff to leave and returned to his patrol car. Plaintiff, in the early stages of insulin reaction, and in an apparently agitated state, jumped from his car and ran around it twice.

Mr. Berry and Officer Connor stopped the Plaintiff, who then sat quietly down on the curb beside the car. At this time the Plaintiff was sitting calmly with Mr. Berry with the police officer kneeling in front of him. Then, according to Mr. Berry's trial testimony:

> ... there was [sic] three or four cars of police done pulled up and blocked me in, and I was asking people for candy, sugar, orange juice or whatever, to help him, and then somebody said, "put the handcuffs on him," and then I got pushed out of the way, knocked out of the way.

The police rolled Plaintiff over face down on the sidewalk and cuffed his hands behind his back. They then picked Plaintiff up and placed him face down on the hood of Mr. Berry's car. While Plaintiff was in this position, he tried telling the police officers to look in his wallet for medical identification showing that he was a diabetic. One of the officers standing behind Plaintiff forcefully pushed his face into the hood of the car. According to Plaintiff's trial testimony:

> ... at that point somebody grabbed me from behind and slammed my head into the hood of Mr. Berry's car, and the next thing that I remember, I was face down,

> an officer on this arm, officer on this arm, officer on my left leg, and on my right leg, and they was [sic] carrying me to the police car, and one of them opened the door and threw me in like a bag of potatoes and closed the door.

During this time, Mr. Berry had continued to beg Respondents to give Plaintiff some sugar or to let him take Plaintiff home. Four of the Respondents carried Plaintiff to the back of a police car and put him in head first. Meanwhile, another friend arrived with orange juice, but the officers refused to let Mr. Graham have it. According to Plaintiff's testimony:

> They had me in the back of the car, and I asked the officer that was standing back there by the car ... "Please give me the orange juice". Her exact words: "I'm not giving you shit."

The police officers drove Plaintiff home, removed him from the patrol car, and allowed Mr. Berry to give him some orange juice. They then removed the handcuffs and released him. Plaintiff immediately fell to the ground. The Respondents drove away, making no effort to assist him. No arrest was ever made.

As a result of the incident with the Respondents, the Plaintiff sought medical treatment. Examining physicians discovered that his foot was broken, he had suffered an abrasion over his right eye, and his wrists were cut from the handcuffs. His right shoulder was injured to the extent that

he could not administer his own insulin injections for approximately two weeks following the incident. After having his face slammed into the hood of the automobile, Plaintiff suffered a continuous, high-pitched, loud ringing in his right ear that was not there before and that has continued ever since. Due to his injuries, he missed more than five weeks of work.

C. DIRECTED VERDICT

At the conclusion of two days of Plaintiff's evidence, all Defendants moved for a directed verdict. The Defendants' motions were granted as to all counts alleged in the complaint. In granting the Defendants' motions, the trial judge applied factors giving rise to a cause of action under § 1983 based upon King v. Blankenship, 636 F.2d 270 (4th Cir. 1980) and Johnson v. Glick, 481 F.2d 1083 (2nd Cir. 1973), as follows:

(1) The need for the application of force;

(2) The relationship between the need and the amount of force that was used;

(3) The extent of the injury inflicted; and

(4) Whether the force was applied in a good faith effort to maintain and restore discipline, or maliciously and sadistically for the very purpose of causing harm.

Based upon these factors, the trial judge considered Plaintiff's evidence and found, inter alia, that "... what

force was applied was a good faith effort to maintain or restore order in the face of a potentially explosive situation and was not applied maliciously or sadistically for the very purpose of causing harm." App. at pp 13a-14a. (Emphasis added)

The trial judge did not address Plaintiff's pendant State common law claims against the Defendant police officers feeling that since there was no § 1983 violation, there could be no jurisdiction for the pendant common law claims.

Judgment was entered in favor of the Defendants on September 23, 1986. The Plaintiff gave timely notice of appeal to the United States Court of Appeals for the Fourth Circuit.

D. OPINION BELOW

Before the Fourth Circuit, the Petitioner alleged that the District Court had erred in granting its directed verdict by applying the fourth standard enumerated in King v. Blankenship, supra. This fourth standard requires the fact finder to determine "whether the force was applied in a good faith effort to maintain and restore discipline, or maliciously and sadistically for the very purpose of creating harm." The standard apparently had its beginnings in the decision of the Second Circuit in Johnson v. Glick, supra.

Before the Fourth Circuit, the Petitioner noted that King involved a claim arising under the Eighth Amendment

prohibition of cruel and unusual punishment of a prisoner. By contrast, Petitioner pointed out that the present case involves a claim of unreasonable seizure in violation of the Fourth Amendment in a situation when the Petitioner was not only not in custody, but also where there was no probable cause that he had committed any offense. Thus, the Petitioner contended before the Fourth Circuit Court of Appeals that the fourth standard enumerated in King, supra, had no bearing on the facts of his case and should not have been used by the trial court in its decision directing verdict against the Plaintiff.

By a two to one majority, the Fourth Circuit panel rejected this argument by saying, "[a]s a threshold matter, we reject any suggestion that the District Court erred in setting forth the correct standard for constitutionally excessive force." App. at p 4a. The Court then cited with approval all four factors enumerated in King, to include "[w]hether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm." App. at p. 4a. (Emphasis added)

The Court specifically rejected the Petitioner's contention that the latter standard should not apply in cases involving alleged violation of the Fourth Amendments prohibition against unreasonable search and seizure by saying: "It

is unreasonable, however, to suggest that a conceptual factor can be central to one type of excessive force claim, but reversible error when merely considered by the court in another context." App. at p. 4a, at fn. 3.

Senior Circuit Judge Butzner registered a vigorous dissent. After noting that Petitioner was not even a pre-trial detainee, Judge Butzner commented that "[t]he Supreme Court has never even hinted that a person in [Petitioner's] situation be subjected to the rigorous standards of the Eighth Amendment in order to receive damages for injuries inflicted by the police." App. at p. 6a. Judge Butzner concluded that the majority's opinion was in direct and substantial conflict with the decisions of this Court in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) and Tennessee v. Garner, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). App. at p. 7a.

Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied by a divided Fourth Circuit on November 13, 1987. App. at pp. 16a-17a.

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW CONFLICTS WITH THE PRIOR DECISION OF THIS COURT IN TENNESSEE V. GARNER.

The majority opinion below is in direct conflict with this Court's decision in Tennessee v. Garner, supra. In Garner, the Court held that for Fourth Amendment purposes the

standard for finding liability under 42 U.S.C. § 1983 is an objective standard of reasonableness considering the totality of the circumstances. 471 U.S. at 8. This is not to say that every push or shove rises to the level of a violation of § 1983. To the contrary, recent precedent of this Court suggests that to be actionable, the Plaintiff must demonstrate conduct rising to the level of at least grossly negligent or reckless conduct. Daniels v. Williams, 106 S. Ct. 662 at 664-667 (1986).

However, it is a far different thing to require a § 1983 claimant, who has done no wrong and yet has suffered multiple injuries at the hands of the police, to prove that those who caused his injuries acted with malice or sadistic intent. Such is the standard enunciated for analyzing substantive due process claims and claims involving cruel and unusual punishment concerning convicted criminals. See, Whitley v. Albers, 106 S. Ct. 1078 at 1088 (1986) (equating substantive due process and cruel and unusual punishment standards).

To require an innocent citizen who claims a violation of his constitutionally protected right against unreasonable search and seizure to demonstrate that the offender acted with malice, sadism or wantonness, unduly erodes the Amendment's historic protection against improper search and seizure and imposes an "intent" requirement for § 1983 claims

which this Court has previously declined to find. See, Parrott v. Taylor, 451 U.S. 527, 534, 101 S. Ct. 1908, 1912 (1981). See also, Monroe v. Pape, 365 U.S. 167, 187, 81 S. Ct. 473, 494 (1961).

II. THERE IS A DIRECT CONFLICT BETWEEN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND THE UNITED STATES COURT OF APPEALS FOR THE FIRST, SECOND, SEVENTH AND NINTH CIRCUITS.

The majority opinion below clearly indicates that proof of motivation by malice or sadism is necessary to sustain an action under 42 U.S.C. § 1983 for violation of Fourth Amendment constitutional rights. The contention that malicious intent must be shown to sustain a claim based upon violation of Fourth Amendment rights has been expressly rejected by the United States Court of Appeals of several circuits.

In Fiacco v. City of Rensselaer, 738 F.2d 319 (2nd Cir. 1986), the jury below had been instructed consistently with Tennessee v. Garner, supra, that in order to find police officers liable for injuries sustained in an allegedly unreasonable seizure involving excessive force, it should determine if the amount of force applied was reasonable under the totality of circumstances considering specifically the officer's right to use reasonable force. The jury found for the claimant on the claim of constitutional violation, but found for the defendants on a pendant state claim that required a jury determination of whether the officers acted

maliciously or wantonly. On appeal, the Second Circuit rejected the defendants' claim that the jury finding in the pendant claim that the officers had not acted maliciously and wantonly, invalidated the findings of liability under 42 U.S.C. § 1983. Thus, by implication, the Second Circuit rejected any requirement that malice or wantonness be demonstrated in a claim for Fourth Amendment violation.

In Lester v. City of Chicago, 830 F.2d 706 (1987), the Seventh Circuit specifically held that in excessive force cases involving violation of Fourth Amendment rights, a subjective inquiry into the offender's motivation regarding whether his actions were inspired by malice or whether they shocked the conscience of the court is not required. 830 F.2d at 712.

The Fourth Circuit's opinion is also in apparent conflict with the decisions of the Ninth Circuit in McKinsey v. Lamb, 738 F.2d 1005 (9th Cir. 1984) and Smith v. City of Fontana, 818 F.2d 1411 (9th Cir. 1987). In McKinsey, the court indicated that in Fourth Amendment cases "[t]he reasonableness of force should be analyzed in light of such factors as the requirements for the officers safety, the motivation for the arrest, and the extent of the injury inflicted." (Citations omitted) 738 F.2d at 1011.

In Smith, the Court, without mentioning malice, sadism, or motivation, applied Tennessee v. Garner, supra, and held that Fourth Amendment violations should be determined under

an objective standard of reasonableness. In contrast, the court noted that the factors of Johnson v. Glick are applicable in cases involving substantive due process claims under the Fourteenth Amendment. 818 F.2d at 1417.

In Fernandez v. Leonard, 784 F.2d 1209 (1st Cir. 1986), the court recognized a distinction in factors to be utilized in analyzing claims of violations of Fifth Amendment substantive due process as compared to Fourth Amendment cases involving unreasonable search and seizure. The decision recognized the factors enumerated in Johnson v. Glick, supra, applicable in cases involving alleged violations of substantive due process, as being different from the standard of objective reasonableness set forth for Fourth Amendment analysis in Tennessee v. Garner, supra. This opinion is many respects similar to the concepts expressed by Judge Butzner in his dissent in the case at bar. App. at pp. 6a-7a.

III. THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION AND IS WORTHY OF THE COURT'S ATTENTION.

Petitioner further respectfully contends that this case presents an important question of Federal law which should be clearly settled by this Court. The continuing controversy concerning the question herein presented is clearly illustrated by the relatively large number of conflicting circuit opinions concerning the subject, and is further amplified by

the recent en banc decision of the Fourth Circuit in Justice v. Dennis, 834 F.2d 380 (4th Cir. 1987). The opinion in Justice mirrors the opinion in the case at bar with the majority opinion of Judge Hall reflecting the majority opinion in this case and the vigorous dissent of Judge Phillips reiterating and expanding upon Judge Butzner's dissent in the case at bar. Petitioner is informed and believes that, at the time of the preparation of this Petition, a Petition for Certiorari is pending to review the decision of the Fourth Circuit in Justice. (Justice v. Dennis, No. 87-1422, Cert. filed February 22, 1988).

CONCLUSION

Petitioner respectfully contends that the issue presented by this case merits consideration by this Court. The issue is plainly, clearly and simply set forth. There are no collateral issues which will complicate and cloud the Court's treatment of this case and lengthen the proceedings. It is further contended that the case at bar presents this Court with a convenient vehicle for resolving the important issue presented herein for the benefit of the lower courts. Therefore, we respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the decision below.

RESPECTFULLY SUBMITTED.

H. GERALD BEAVER
Beaver, Thompson, Holt &
Richardson, P.A.
806 Hay Street
P. O. Box 53247
Fayetteville, NC 28305
919-323-4600

COUNSEL OF RECORD

EDWARD G. CONNETTE
Gillespie, Lesesne & Connette
1001 Elizabeth Ave., Suite 1-D
Charlotte, NC 28204
704-372-5700
OF COUNSEL

A P P E N D I X

[1] To justify a plain view seizure, the government must establish: 1) that the law enforcement agent was lawfully in the place where he discovered the items seized; 2) that the discovery of the items was inadvertent; and 3) that the incriminating nature of the items was immediately apparent. *Coolidge v. New Hampshire*, 403 U.S. 443, 465–66, 91 S.Ct. 2022, 2037–38, 29 L.Ed.2d 564 (1971); *United States v. Scarfo*, 685 F.2d 842, 845 (3d Cir.1982), *cert. denied*, 459 U.S. 1170, 103 S.Ct. 815, 74 L.Ed.2d 1014 (1983). The first two requirements of the plain view doctrine are clearly satisfied here. The agents, in executing the warrant to search for Schroth's property, were required to examine the crawl space and to open the brown bag and the cloth Englehart Refinery bag. Their discovery of 47 watches not listed in the Schroth inventory was inadvertent. Thus, the case turns on whether the incriminating nature of the watches was immediately apparent.

When the watches were discovered, the agents knew that Kautz, a professional burglar was fencing goods stolen from North Jersey retail stores with Meyer Trading Company. They discovered three packages of fenced merchandise from Schroth's which were secreted in a crawl space. The watches were in the only other container in the crawl space. The crawl space had been partially concealed by a table and cardboard boxes. Moreover, the premises had several large walk-in safes which were more appropriate storage spaces, as well as display areas in the public part of the store. When the agents asked for evidence of legitimate ownership of the watches, none was produced. Taken together, this set of circumstances was sufficient to lead a reasonably cautious person to believe that the watches were connected with the Meyers's criminal activities. *See Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983); *United States v. Schecter*, 717 F.2d 864, 870 (3d Cir.1983). Thus, whether or not one credits Agent Skarbek's testimony about his knowledge of the Jewelry Workshop burglary of watches, the record amply supports the conclusion that the incriminating nature of the cache of 47 watches was immediately apparent.

[2] *Arizona v. Hicks*, — U.S. —, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987), does not suggest otherwise. In that case, the state conceded that the officers had no more than a reasonable suspicion that the stereo equipment in issue was stolen. The Court held that the application of the plain view doctrine requires probable cause, rather than reasonable suspicion, that the items seized are contraband. That standard is met here. When the agents discovered, in a crawl space under a partially concealed trap door in the premises of a known fence, a cache of four packages of merchandise, three of which contained stolen goods, they had more than a reasonable suspicion that the contents of the fourth package, of similar merchandise, was also stolen merchandise, rather than legitimate inventory. At the time their request for proof of ownership was not met, they already had probable cause. The agents had to examine the contents of the cloth bag in order to execute the warrant. That examination did not become a seizure until the suspicious circumstances amounting to probable cause were confirmed by the absence of confirmation of legitimate ownership.

The suppression orders appealed from will, therefore, be reversed.

Dethorn GRAHAM, Plaintiff-Appellant,

v.

CITY OF CHARLOTTE; M.S. Connor; R.B. Townes; T. Rice; Hilda P. Matos; M.M. Chandler, Defendants-Appellees.

No. 86-2163.

United States Court of Appeals, Fourth Circuit.

Argued April 6, 1987.

Decided Aug. 25, 1987.

Diabetic who was restrained by police while suffering insulin reaction brought

civil rights action against city and police officers. The United States District Court for the Western District of North Carolina, 644 F.Supp. 246, Robert D. Potter, Chief-Judge, directed verdict for city and officers, and diabetic appealed. The Court of Appeals, K.K. Hall, Circuit Judge, held that force used by officers was not excessive so as to rise to level of violation of diabetic's constitutional rights.

Affirmed.

Butzner, Senior Circuit Judge, dissented and filed opinion.

1. Civil Rights ⇐13.4(2)

In determining whether police have used constitutionally excessive force, court must consider need for application of force, relationship between need and amount of force used, extent of injury, and whether force was applied in good-faith effort to maintain and restore discipline or maliciously and sadistically for purpose of causing harm. U.S.C.A. Const.Amends. 4, 5, 8.

2. Civil Rights ⇐13.4(2)

Police officers did not use constitutionally excessive force in subduing and handcuffing diabetic who was having insulin reaction, even though diabetic suffered broken foot and other injuries, in absence of testimony that any officer struck diabetic or in any way inflicted injuries. U.S.C.A. Const.Amends. 4, 5, 8; Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 704.

3. Federal Courts ⇐14

Pendent jurisdiction over state claims in federal court is matter of judicial discretion.

Edward G. Connette (Gillespie, Lesesne & Connette, Charlotte, N.C., on brief), for plaintiff-appellant.

Frank Bayard Aycock, III, Charlotte, N.C., for defendants-appellees.

Before RUSSELL and HALL, Circuit Judges, and BUTZNER, Senior Circuit Judge.

K.K. HALL, Circuit Judge:

Dethorn Graham, the plaintiff in an action alleging the unconstitutional infliction of excessive force by officers of the Charlotte, North Carolina Police Department, appeals an order of the district court, 644 F.Supp. 246, granting a directed verdict in favor of the defendants. Although we find that the conduct of the police officers was far from commendable, we agree that no constitutional injury occurred. We, therefore, affirm.

I.

On November 12, 1984, Graham was working on an automobile at his home in Charlotte, North Carolina, when he felt the onset of a diabetic insulin reaction. For a diabetic such as Graham a reaction caused by a drop in blood sugar can cause nausea, dizziness, and disorientation. Left untreated the reaction can lead to coma or even death.

When Graham noticed his insulin reaction, he asked a friend, William Berry, to drive him to a nearby convenience store. Graham intended to purchase orange juice, knowing that the sugar content would counteract the reaction. When he entered the store, however, Graham saw a number of people ahead of him at the counter. In an apparently agitated state, Graham ran or walked rapidly out of the store and asked Berry to drive him to his girlfriend's house.

During this time, officer M.S. Connor of the Charlotte Police Department had been sitting in his patrol car near the convenience store. Observing Graham's erratic behavior, Connor followed the car being driven by Berry and made an investigative stop approximately one-half mile from the store. As Connor approached the automobile, Berry informed him that Graham was having a "sugar reaction." Connor responded that Berry would have to wait until it was determined what, if anything, Graham had done at the convenience store. Connor then returned to his patrol car to summon backup assistance.

At this point, Graham, in the throes of the insulin reaction, exited Berry's automobile and ran around it twice. At Berry's request, Connor approached to assist Berry in catching and restraining Graham. When

Connor and Berry approached, he sat down on the curb. Graham testified that he lost consciousness during that time and that when he awoke he was lying face down on the ground with his hands cuffed behind his back.

At different intervals, four other Charlotte police officers, R.B. Townes, Hilda Matos, M.M. Chandler, and T. Rice, arrived on the scene in response to Connor's request for backup. A crowd also began to gather from a nearby apartment complex. After the police officers determined that no crime had been committed at the convenience store, they decided to place Graham in a patrol car and transport him home.

Graham testified that he struggled with the officers because they would not allow him to reach his wallet and display a card identifying him as a diabetic. He also maintained that the officers refused to allow one of his friends to give him orange juice and that one of the officers cursed him when he asked for the juice. Graham further maintained that in the struggle, his face was slammed against the hood of the police car before he was then forcibly shoved into the car and driven home.

It is undisputed that at some point during the unfortunate incident Graham's foot was broken. Graham also contended that he suffered an abrasion over his left eye, that his wrists were cut by the handcuffs, that his right shoulder was injured and that he developed a loud ringing in his right ear as a result of being "slammed" onto the hood of the automobile.

Graham subsequently brought a civil action in district court on July 11, 1985, against the City of Charlotte and the five individual police officers present on November 12, 1984. In addition to alleging the infliction of constitutionally excessive force by the officers, Graham charged that the city had failed to train its police officers to respond appropriately to a medical emergency. He also alleged the officers' conduct amounted to discrimination on the basis of handicap in violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 704. Finally, Graham asserted pendent state claims of assault, false imprisonment and intentional infliction of emotional distress under North Carolina common law.

The case came on for trial on September 16–17, 1986. In addition to his own account of the incident, Graham presented the testimony of William Berry and Officer Townes. Graham also sought to introduce expert testimony by Dr. Robert Meadows on the subject of proper police training.[1]

Following the presentation of plaintiff's case, all defendants moved for a directed verdict pursuant to Fed.R.Civ.P. 50. Upon consideration of the motions, the district court first concluded that a reasonable jury, viewing the evidence in the light most favorable to plaintiff, could not find that the infliction of force by the police officers was constitutionally excessive. The court also found that Graham's allegation of improper or inadequate police training by the City of Charlotte was refuted by the testimony of his own expert witness. Finally, the court rejected the claim of handicap discrimination based on § 504 of the Rehabilitation Act on the ground that the statute did not reach misconduct of the sort alleged by Graham. Accordingly, the district court granted all motions for a directed verdict as to all counts of the plaintiff's complaint.[2]

II.

On appeal, Graham contends that the evidence presented was sufficient to raise a jury question as to whether the officers' use of force and refusal to provide medical care were constitutionally unreasonable.

1. Dr. Meadows, an experienced instructor in the field of criminal justice, was employed at Appalachian State University at the time of the trial. The court permitted Dr. Meadows to express an opinion regarding the appropriate level of police training. The court declined, however, to allow Meadows to offer an opinion concerning whether the officers acted in conformity with adequate training on November 12, 1984. In this appeal, Graham contends that the court erred in restricting the opinion of his expert.

2. The district court's order made no specific reference to the pendent state claims. Graham suggests, however, that a directed verdict on "all counts" implied that a directed verdict was granted in those claims.

Graham further argues that the district court applied an incorrect legal standard when it assessed the evidence in support of his excessive force claim. Finally, Graham maintains that the district court committed reversible error in both the disposition of his state tort claims and the limitation imposed on Dr. Meadows' expert testimony. We see no merit in any of Graham's contentions.

[1] As a threshold matter, we reject any suggestion that the district court erred in setting forth the correct standard for constitutionally excessive force. Citing the factors articulated in our decision in *King v. Blankenship*, 636 F.2d 70 (4th Cir.1980), the district court expressly considered:

(1) The need for the application for the force,
(2) The relationship between the need and the amount of the force that was used,
(3) The extent of the injury inflicted, and
(4) Whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.

Graham argues, however, that subsequent decisions of this Court including *Carter v. Rogers*, 805 F.2d 1153 (4th Cir. 1986), *Justice v. Dennis*, 793 F.2d 573 (4th Cir.1986), and *Kidd v. O'Neil*, 774 F.2d 1252 (4th Cir.1985), have altered the *King* factors by abandoning consideration of whether the allegedly excessive force was "applied maliciously and sadistically for the very purpose of causing harm." Graham contends that excessive force is now measured on a totality of the circumstances that examines only the need for force, the amount of force used and the extent of any injury inflicted. Appellant's theory, however, is rooted in a substantial misreading of our previous decisions.

In *Kidd*, we rejected a lower court's determination that constitutionally excessive force turned solely upon whether the state actor had intentionally deprived a plaintiff of a specific constitutional right. Instead, we concluded that an excessive force claim required the court to "grapple" with both the degree of force applied and the factual context in which the force arose. *Kidd*, 774 F.2d at 1261. Far from rejecting consideration of the fourth *King* factor, we held that concepts such as "malicious and sadistic" should be understood as descriptions of the degrees of force that exceed the state's privilege, and, thereby, implicate intrusions into constitutionally protected "personal security." *Id.*[3]

In *Carter* and more specifically in *Justice*, we have confronted the question of how best to instruct the jury on the issue of excessive force. Our concern has been that the jury should examine all of the relevant circumstances when determining whether the use of force was constitutionally unreasonable and not focus exclusively on any one factor. While that issue has not at this juncture, been conclusively resolved [4], nothing that we ultimately decide with regard to proper jury instructions is likely to affect the propriety of the district court's balanced application of the four *King* factors when ruling on a motion for a directed verdict.

[2] We conclude, therefore, that the district court did not use an erroneous legal standard when deciding whether Graham's

3. In *Kidd*, we recognized that the right to personal security may, depending upon the factual circumstances, involve rights protected by the fourth, fifth or eighth amendments. In the recent decision by the United States Supreme Court in *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986), the court concluded that an excessive force claim arising under the eighth amendment "ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" [Citations omitted] 106 S.Ct. at 1085

Graham was, of course, not an incarcerated prisoner. His complaint of excessive force did not, therefore, arise under the eighth amendment. It is unreasonable, however, to suggest that a conceptual factor could be central to one type of excessive force claim but reversible error when merely considered by the court in another context.

4. The panel decision in *Justice* was vacated by a grant of *en banc* rehearing, 802 F.2d 1486 (4th Cir.1986). The opinion of the full court has not yet been announced.

case could withstand a motion for a directed verdict. The only question remaining is whether under that standard, a reasonable jury viewing the evidence in the light most favorable to the plaintiff could have found that Graham's constitutional right to personal security was violated by officers of the Charlotte police department. *e.g.*, *Wheatley v. Gladden*, 660 F.2d 1024 (4th Cir.1981). We agree with the district court that appellant's evidence could not support a verdict in his favor.

It is undisputed that on November 12, 1984, Officer Connor observed a man in a state of obvious agitation run into a convenience store, exit almost immediately, enter a car and drive rapidly away. Under those circumstances, reasonable suspicion would justify at least a brief investigative stop of that vehicle. Indeed, appellant has not contended in this appeal that the initial stop of Berry's automobile was improper.

Once the stop had occurred, Graham's illness induced behavior was so erratic that Berry was forced to seek the officer's assistance in restraining him. Graham suggests on appeal that he was sitting calmly when the additional police officers arrived and handcuffed him. Graham's trial testimony, however, was that he had no memory of what transpired between the time the car was stopped and the moment he regained consciousness lying on the ground. Although Berry initially testified that Graham was calm at that time, he conceded on cross-examination that in a statement to the police on November 26, 1984, he had stated that Graham was "having fits." Officer Townes, the first backup officer on the scene, was called as plaintiff's witness and testified that when he arrived, Graham was lying on the ground and kicking backwards toward Officer Connor. Finally, appellant's own expert witness, Dr. Meadows, opined that under the circumstances it was appropriate to subdue and handcuff him. Clearly Graham's own evidence fails to demonstrate either unnecessary or excessive force at this juncture.

We likewise see nothing in the evidence below to suggest that the bounds of constitutionally impermissible behavior were crossed by the subsequent efforts of the officers to remove Graham from the scene. Townes testified that the crowd that had gathered was becoming unruly. In light of that uncontested testimony, the district court's conclusion that removing Graham was an expedient method of avoiding further confrontation is eminently reasonable.

There is no question from the available record that Graham physically resisted the effort to place him in the police car. Sadly, there is also no question that in the course of that resistance, he sustained a broken foot. Nevertheless, there was no testimony from which a reasonable juror could infer that any officer struck Graham or in any way inflicted that injury. Indeed, the available evidence strongly suggests that the injury was both accidental and self-inflicted.

Graham also alleged that the officers "slammed" his head into the hood of an automobile thereby causing an injury that manifested itself as a continuous ringing in his right ear. Berry, however, testified that while he saw the officers push appellant's head down during the struggle, he heard no impact with the car. Moreover, appellant presented no medical evidence to support his allegation of head injury.

Finally, we agree with the district court that there is no evidence that the officers denied appellant medical treatment. Indeed, the uncontested testimony of Officer Townes was that Graham was twice asked whether he wanted medical assistance. Townes further testified that Graham declined the offer, both at the scene of the stop and at the time he was transported to his home.

Appellant's unfortunate encounter with the Charlotte Police Department on November 12, 1984, was a lamentable occurrence. It is deeply regrettable that a private citizen who had committed no crime was forcibly taken into custody and suffered injury as a result. Nevertheless, the evidence clearly indicates that at each stage of the incident, the actions of the officers were essentially reasonable under the circumstances.

As the district court soundly noted, not every push or shove by a state actor can rise to the level of a violation of constitu-

tional rights. It may be fairly debated whether the officers of the Charlotte Police Department behaved wisely on November 12, 1984. We are convinced, however, that a reasonable jury weighing the evidence presented below in accordance with legal standards in this Circuit, could not find that the force applied was constitutionally excessive.[5] We, therefore, agree with the district court's decision to grant a directed verdict in favor of the defendants.

III.

[3] Appellant's remaining contentions need not detain us long. With regard to the pendent state claims, we see no indication that the district court actually addressed them in its order granting a directed verdict. Pendent jurisdiction over state claims in federal court is a matter of judicial discretion. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). In light of the thorough and explicit disposition of all of Graham's federal claims, we conclude that the district court's silence on the pendent claims indicates that those claims were dismissed without prejudice to appellant's right to pursue them in state court. We can see no abuse of discretion in that decision.

We likewise see no merit in Graham's claim that the district court erred in restricting the testimony of his expert witness. The testimony which the district court barred related to whether the officers present on November 14, 1984, acted in accordance with proper training. Even were we to conclude that the district court's action somehow exceeded its broad discretion in determining evidentiary admissibility, there would still be no reason to disturb the decision below. Dr. Meadows' proffered testimony was relevant only to Graham's claim that the City of Charlotte had failed to train its police officers adequately. Graham has not, however, appealed the dismissal of his claim against the City. With regard to the issues remaining on appeal, the limitation of Dr. Meadows' testimony has no significance.

IV.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

BUTZNER, Senior Circuit Judge, dissenting:

I

Affirmance of the district court's grant of a directed verdict rests on the faulty premise that Graham's rights and the conduct of the police are measured by a standard fashioned to implement the eighth amendment's prohibition against cruel and unusual punishment. It was error to require Graham to prove, in the words of *King v. Blankenship*, 636 F.2d 70, 73 (4th Cir.1980), that the police acted "maliciously and sadistically for the very purpose of causing harm." *King* dealt with a convict's claim against his guard for cruel and unusual punishment in violation of the eighth amendment. To establish such a violation, a convict must prove "unnecessary and wanton infliction of pain." *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078, 1084, 89 L.Ed.2d 251 (1986). But Graham was not a convict. He was not even a pretrial detainee or a person under arrest. He was a free, innocent citizen, a man who had a responsible job with the North Carolina Department of Transportation. Unfortunately, he suffered from diabetes and occasional insulin reactions.

The Supreme Court has never even hinted that a person in Graham's situation should be subjected to the rigorous standards of the eighth amendment in order to recover damages for injuries inflicted by the police. The reason for distinguishing between a convict and a free citizen is clear. The police are not privileged to inflict any punishment on a free citizen.

5. Our decision should not be read as unqualified approval of the conduct of the Charlotte officers. Indeed, we are profoundly dismayed by evidence of coarse and abusive language employed against appellant during the time he was restrained. This deplorable behavior which reflects little credit on Charlotte Police Department, cannot, however, alter our basic conclusion that no constitutional injury was inflicted.

Consequently, there is no justification for absolving the police from liability unless the citizen can prove that their conduct satisfied the test for proving cruel and unusual punishment.

The fourth amendment, made applicable to the states through the fourteenth, provides that "the right of the people to be secure in their persons ... against unreasonable ... seizures shall not be violated...." Supreme Court precedent establishes that this amendment—not the eighth—is applicable to the claim of a person who protests police conduct arising out of an investigatory stop. In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the Court held that the authority of police to make an investigatory stop "must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." 392 U.S. at 20, 88 S.Ct. at 1879. This involves a dual inquiry: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." 392 U.S. at 20, 88 S.Ct. at 1879.

Recently, in rejecting the claim that police are authorized to kill an apparently unarmed, nondangerous fleeing suspect, the Supreme Court reviewed the fundamental principles that govern the interaction of police and citizens. In *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985), the Court reiterated that "[w]henever an officer restrains the freedom of a person to walk away, he has seized that person." The Court then explained: "To determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" 471 U.S. at 8, 105 S.Ct. at 1699. In neither *Terry*, *Garner*, nor *Whitley* does the Court suggest that the intrusion on an individual's fourth amendment interests occasioned by an investigative stop is valid unless the individual proves by a preponderance of the evidence that the police acted "maliciously and sadistically for the very purpose of causing harm." Although the police acknowledge that Graham is not a convict, they insist that the rigorous standard of proof unique to a convict's claim arising under the eighth amendment bars Graham's action as a matter of law. Their argument is supported by neither logic nor precedent. Instead, it is refuted by *Terry* and *Garner*. We too have long recognized these basic precepts of fourth amendment jurisprudence. *See Kidd v. O'Neil*, 774 F.2d 1252, 1255 (4th Cir.1985).

II

The police acted reasonably in making an investigative stop. But that is not the end of the fourth amendment inquiry. *Garner* explains: "Because one of the factors is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out." 471 U.S. at 8, 105 S.Ct. at 1699; *see also Terry*, 392 U.S. at 20, 28–29, 88 S.Ct. at 1879, 1883–84. The conduct of the police after the stop is critical to this inquiry.

Because we are reviewing a directed verdict we must determine whether there is evidence which would permit the jury to reach a verdict in favor of Graham. Our review is governed by the following standard:

> In determining whether the evidence is sufficient the court is not free to weigh the evidence or to pass on the credibility of witnesses or to substitute its judgment of the facts for that of the jury. Instead it must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence.

9 Wright & Miller, *Federal Practice and Procedure* § 2524 at 543–45; *see also Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, 82 S.Ct. 1404, 1499, 8 L.Ed.2d 777 (1962).

Properly viewed, the evidence discloses that the officer's investigatory stop revealed that Graham was unarmed, that he presented no danger to the public, and that no probable cause existed to believe he had committed a crime. Berry promptly told the officer that Graham was suffering from a sugar reaction. After Graham had

run around the car twice, Berry and the investigating officer calmed him down as he sat on the curb. Another officer appeared and without inquiry about Graham's condition pushed Berry aside, rolled Graham over, and handcuffed him. A third officer arrived on the scene and opined: "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M.F. but drunk. Lock the S.B. up."

When Graham, restrained by handcuffs, asked an officer to look in his wallet for his diabetic decal, the officer told him to "shut up" and slammed his head against Berry's car. Aware that they could place no charges against Graham, four officers threw him into a police car. A friend brought orange juice to the police car where Graham was confined in handcuffs. Graham asked the officer to give him the orange juice, and the officer responded "I'm not giving you shit." The officers took Graham to his home where he collapsed in the yard. Friends gave him orange juice and took him to a doctor.

Graham suffered a head injury that left him with a ringing in his ear and an abrasion on his head. He also suffered injuries to his wrists, an injury to his shoulder, and a broken foot. If his evidence is credited, a jury could find that the police caused the injuries.

The police take the position that Graham proved no actionable harm because Berry, one of Graham's witnesses, did not hear any impact when the police pushed Graham's head against the car and because Berry's statement to a police investigator differed in some respects from his testimony. The police also emphasize that Graham's expert witness acknowledged that it was appropriate to restrain him. Reliance on these arguments for affirmance violates both the standard for reviewing a directed verdict and Federal Rule of Evidence 607. A party is no longer bound by the statement of his own witness. It was the jury's function—not the court's—to decide which version of Berry's account to believe. Moreover, Graham's expert soundly criticized the manner in which the police conducted themselves. His testimony on which the police rely was made in response to a hypothetical question on cross examination framed most favorably for the police in disregard of much of Graham's evidence. Again, the jury was the proper arbiter of the weight to be accorded the expert's response.

Within minutes after the investigatory stop the police knew they were dealing with a seriously ill man who was innocent of any crime. Whether the scope and conduct of their seizure violated the reasonableness requirement of the fourth amendment clearly presented a question for the jury to determine in accordance with the principles explained in *Terry* and *Garner*.

WEST KEY NUMBER SYSTEM

Mazie KELLER, Plaintiff-Appellant,

v.

PRINCE GEORGE'S COUNTY; Prince George's County Department of Social Services, Defendants-Appellees,

Equal Employment Opportunity Commission, Amicus Curiae.

No. 86-3876.

United States Court of Appeals, Fourth Circuit.

Argued March 5, 1987.

Decided Aug. 26, 1987.

Employee of county department of social services brought civil rights suit under Title VII and under § 1983 alleging that denial of her request for promotion was based on racial discrimination. The District Court, 616 F.Supp. 540, Edward S. Northrop, Senior District Judge, held that employee could not maintain § 1983 action where allegedly discriminatory state action was also covered by Title VII, and dismissed § 1983 claim. After bench trial, the District Court entered judgment for defendants on Title VII claim. Plaintiff ap-

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-85-439-P

FILED
CHARLOTTE, N.C.

SEP 19 1986

U.S. DISTRICT COURT
W. DIST. OF N.C.

DETHORNE GRAHAM,

Plaintiff,

vs.

CITY OF CHARLOTTE, et al.,

Defendants.

O R D E R

This is an action by Plaintiff brought under Title 42 U.S.C. § 1983 against the City of Charlotte and the individual police officers for damages for denial of Plaintiff's civil rights as a result of the alleged use of excessive force by the police officers in restraining the Plaintiff on November 12, 1984. The Plaintiff further alleges that the Defendants unlawfully assaulted Plaintiff, unlawfully restrained him, constituting false imprisonment and intentionally inflicted mental and emotional distress on Plaintiff in violation of the common law of North Carolina. The Plaintiff also alleges that the actions of the City of Charlotte in not properly training its officers to identify and respond to medical emergencies violate Section 504 of the Rehabilitation Act of 1973, Title 29 U.S.C. § 794, and North Carolina General Statute § 168-2.

At the close of the Plaintiff's evidence all of the Defendants moved for a directed verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure.

The Court, of course, in ruling on the Motion must consider the evidence in the light most favorable to the Plaintiff. Galloway v. U.S., 319 U.S. 372 (1943); McClure v. Price, 300 F.2d 538 (4th Cir. 1962); Phoenix Savings & Loan, Inc. v. Aetna Casualty & Surety Co., 427 F.2d 862 (4th Cir. 1970).

The evidence, when reviewed in the light most favorable to the Plaintiff, is that on November 12, 1984, the Plaintiff, who was a diabetic, had an insulin reaction at approximately 1:55 p.m., while doing mechanical work on an automobile at his shop. He asked his friend William Berry to drive him to a convenience store, the Pilot store, in order for him to obtain some orange juice to counteract his insulin reaction.

When they arrived at the store, where the Defendant officer Connor was parked in his patrol car, the Plaintiff rapidly exited or ran into the store and on seeing a line of four or five persons at the counter, did not want to wait and ran or walked rapidly out of the store and returned to Berry's automobile, and told Berry, to take him to his girlfriend's house or pointed in the direction of his girlfriend's house, where the Plaintiff testified he could obtain the orange juice he needed. As Berry drove out of the convenience store parking lot, he was followed by Officer Connor who stopped him approximately one half mile away. Officer Connor observed the Plaintiff in the passenger seat and told Berry he would have to wait until Officer Connor determined what, if anything, Plaintiff had done in the convenience store.

Plaintiff, suffering from his insulin reaction, then exited Berry's automobile and ran around it twice. Berry then asked Officer Connor to help him catch Plaintiff, and suggested that Officer Connor go one way around the car and that he, Berry, would go the other way. On seeing Berry and Connor coming from opposite directions, Plaintiff sat down on the curb and Officer Connor and Berry knelt down to see what was wrong with Plaintiff. The Plaintiff apparently passed out and the next thing he remembered was that he was handcuffed and lying face down on the sidewalk and that in addition to Connor there were four other police officers. These police officers had arrived in response to a call for a back up by Officer Connor.

Meanwhile, a crowd had gathered around and Officer Townes testified that it appeared things were getting out of hand.

The Plaintiff testified that the officers picked him up and with his hands cuffed behind his back placed him against and over the hood of Berry's car. The Plaintiff then tried to reach for his wallet in his hip pocket and lifted his head up to tell the officers that he was a diabetic and wanted his wallet to show his diabetic identification. One of the officers, Matos, shoved his head down and told him to shut up that no one had asked him anything. At some point during the incident, Plaintiff was asked if he wanted medical assistance and he declined.

The officers then attempted to place the Plaintiff in Officer Connor's patrol car and the Plaintiff vigorously resisted this effort, by kicking and otherwise attempting to keep from

being placed in the car. The evidence was that two officers were pushing from behind and one entered the vehicle from the other side and pulled on the Plaintiff until he was in the car.

Officer Connor then determined that the Plaintiff had not done anything unlawful while in the convenience store, but was advised by his dispatcher that the Plaintiff was the owner of one or more guns.

The Plaintiff was then immediately driven home and his hands were uncuffed. He again was asked if he wanted medical assistance and he declined.

Plaintiff's witness, Berry, testified that he did not see any officer push or strike the Plaintiff, except when his head was pushed down on the hood of his automobile. However, Berry testified that his head made no sound when pushed against the hood.

The Court does not find, considering the evidence in the light most favorable to the Plaintiff, that there was excessive force used by the police officers rising to the level of violation of his constitutional rights.

The factors to be considered in determining when the excessive use of force gives rise to a cause of action under § 1983 are identified as

(1) The need for the application for the force.

(2) The relationship between the need and the amount of the force that was used.

(3) The extent of the injury inflicted.

(4) Whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.

King v. Blankenship, 636 F.2d 270 (4th Cir. 1980), citing Johnson v. Glick, 481 F.2d at 1083.

The Plaintiff's evidence, when considered in the light most favorable to him, shows:

(1) The Plaintiff was having an insulin reaction and was in such a state of agitation that his witness Berry asked Officer Connor to help him to catch him.

(2) The amount of force used consisted of handcuffing the Plaintiff which even his own witness, Dr. Meadows, testified was appropriate under the circumstances.

(3) There was no discernable injury inflicted on the Plaintiff. It is true that the Plaintiff's foot was broken during the scuffle with the police. There is absolutely no evidence that the Defendant police inflicted any injury on the Plaintiff.

(4) It is quite evident that what force was applied was a good faith effort to maintain or restore order in the face of

a potentially explosive situation and was not applied maliciously or sadistically for the very purpose of causing harm.

This Court does not deem every push or shove under the circumstances of this case to rise to the level of a violation of constitutional rights.

It is a far cry from the situation on the line in the face of a potentially hostile crowd, and the peaceful atmosphere of the courtroom. These officers were faced with a man whose initial stop was entirely proper, and whose restraint was entirely proper. They were faced with a gathering crowd. Crowds can often become unruly. The most expedient way to avoid a confrontation was to remove the Plaintiff from the scene.

A suggestion was made that a police supervisor should have been called. This would have entailed another 15 or 20 minutes of police presence with a crowd gathering.

Obviously, since the officers have been found by the Court not to have violated the Plaintiff's constitutional rights, for use of excessive force, there would not be any liability on the part of the City of Charlotte.

The Plaintiff's Complaint conatined allegations that the City violated Plaintiff's civil rights by failing to supervise or properly train its police officers to identify and respond to the Plaintiff's medical problem, by failing to supervise or train its police officers to insure that reasonable alternatives to the restraint used on Plaintiff were known and available to officers,

that Plaintiff was a qualified handicapped person on November 12, 1984, and that the City or its police officers discriminated against Plaintiff on the basis of his handicap.

The evidence, however, shows, taking Plaintiff's witness Dr. Meadows' testimony, that the Charlotte Police Department's training of its officers met or exceeded the number of hours required by the State.

Further, § 504 of the Rehabilitation Act of 1973, Title 29 U.S.C. § 794, refers to discrimination against a handicapped person by reason of his handicap by exclusion from any program or activity receiving Federal Financial Assistance. The stopping of the Plaintiff under the circumstances of this case and the restraint of the Plaintiff who was having an insulin reaction by no stretch of the imagination would be prohibited by N.C.G.S. § 168-2, § 504 of the Rehabilitation Act of 1973.

NOW, THEREFORE, IT IS ORDERED that all Defendants' Motions for a directed verdict as to all counts of the Plaintiff's Complaint are GRANTED.

This the 17th day of September, 1986.

ROBERT D. POTTER, CHIEF
UNITED STATES DISTRICT JUDGE

Certified to be a true and
correct copy of the original.
U. S. District Court
Thomas J. McGraw, Clerk
Western Dist. of N. C.
By Alley Thomas
Deputy Clerk
Date 9/19/86

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 86-2163

Dethorn Graham, Appellant,

versus

City of Charlotte, et al, Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert D. Potter, District Judge.

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court.

On the question of rehearing before the panel, Judge Butzner voted to rehear the case. Judges Russell and Hall voted to deny.

In a requested poll of the Court on the suggestion for rehearing in banc, Chief Judge Winter, and Judges Phillips, Murnaghan and Ervin voted to rehear the case in banc; and Judges Russell, Widener, Hall, Sprouse, Chapman, Wilkinson and Wilkins voted against in banc rehearing.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as a majority of the active circuit judges voted to deny rehearing in banc,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc is denied.

Entered at the direction of Judge Hall.

For the Court,

JOHN M. GREACEN

CLERK